

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS**

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Appellant,)	
)	
v.)	Case No. 3:11-CV-836 DRH
)	
DONALD SAMSON, Trustee for)	
The Estate of Chemetco, Inc.,)	
)	
Appellee,)	

IN RE:)	Appeal of Proceedings Under Chapter 7
)	Case No. 01-34066
CHEMETCO, INC.)	
)	
Debtor.)	

**BRIEF OF APPELLEE DONALD SAMSON, TRUSTEE
FOR THE ESTATE OF CHEMETCO, INC.**

The decision and order of Judge Meyers in the Bankruptcy Court is supported by the law and facts and this appeal by the Illinois Environmental Protection Agency (“IEPA”) should be denied.

STATEMENT OF ISSUES

Whether the Bankruptcy Court’s approval of the Motion to Pay Secured Creditor and Allocate Funds should be affirmed.

STATEMENT OF THE CASE

The single issue presented to the Bankruptcy Court by the IEPA concerned whether there would be a proper distribution of funds from the specific sales of materials identified in the

Notices dated 12/01/2010 and 04/15/ 2011. (APP 0088 – 0091).¹ In order to resolve this issue, the Bankruptcy Court properly considered its prior orders approving the material sales and applied the plain language from agreements it previously approved that governed how distributions would be made.

Significantly, the IEPA consented to each of the actual sales² of the materials here involved. (APP 0092, par. 1)(PMES Brief, p. 9). As explained in the Brief filed by Paradigm Minerals and Environmental Services, LLC (“PMES”), no objection has been made to the sales of materials because these represent substantial progress toward the goal of cleaning up the site. (PMES Brief, p. 2-3). Not only will the sales advance the cleanup of the site, they will help generate operating funds essential to permit the Trustee and PMES to continue to develop and implement the process for refining and selling the remaining materials.

The Bankruptcy Court orders, applicable contracts, and the actions of the Trustee and PMES are designed to clean-up the site and maximize recovery for creditors. Applying the plain language of the controlling orders and documents will permit continued progress toward improving conditions at the Chemetco site.

The Trustee notes, as described in the PMES Brief, that the IEPA has abandoned each of the grounds it raised in its objection in the Bankruptcy Court. This alone presents sufficient reason to find the arguments not raised in the Bankruptcy Court and asserted here for the first time on appeal have been waived and to deny the relief requested.

For the reasons set forth here and in the record, the Trustee respectfully requests that the appeal of the IEPA be denied.

¹ References are to the Combined Appendix to Separate Briefs Filed by Paradigm Minerals and Environmental Services, LLC and Commerce Bank. This Combined Appendix contains the necessary documents to determine this appeal.

² The sales involved here represent only a small fraction of the material present at the site. Efforts are ongoing to develop and implement a process that will address remediation of the majority of the materials on the site.

STATEMENT OF FACTS

The Trustee will not overly lengthen his Brief by repeating information contained in pages 4 – 11 of the PMES Brief. Nonetheless, some further discussion of the facts underlying these transactions should assist this Court in affirming the decision of the Bankruptcy Court.

A. The Agreement

No dispute exists regarding the identification or content of the Agreement that governs the sales. The Trustee entered into an Asset Purchase and Processing Agreement (as approved, amended and clarified by orders of the Bankruptcy Court, the “Agreement”) with the predecessor to PMES. (APP 0055). Pursuant to a joint motion filed by the Trustee, PMES and the IEPA, the Bankruptcy Court approved and clarified the Agreement by Order dated September 21, 2009. (APP 0001). The Agreement was further clarified and amended by Motion and Order dated March 9, 2010 and May 4, 2010 respectively. (APP 0007 and APP 0010).

The Trustee agrees with and adopts the discussion contained in the PMES Brief, pages 6 – 8 regarding the contract terms and formulas. As is made plain there, the Bankruptcy Court used the appropriate formulas and therefore reached the right result in the decision below.

B. Sales Under the Agreement

No dispute exists that the IEPA consented to each sale that is the subject of this appeal. By a Notice dated December 1, 2010, the Trustee stated his intention to sell approximately 4000 tons of scrubber sludge and 3,500 tons of mixed fines. (APP 0088). By a Notice dated April 15, 2011, the Trustee stated his intention to to sell (among other things) approximately 120 tons of furnace clean up consisting of varying grades of copper and tin. (APP 0090). No objections to either sale were made. (APP 0092, par. 1). Thus, all parties consented to the actual sales of the materials here involved.

C. Allocation of Sale Proceeds

The allocation of the sales proceeds follows the terms of the Agreement. The materials sold were Recovered Materials under the Agreement. Sale of Recovered Material generates Processing Revenue, further defined as gross revenue net of Operating Expenses. (APP 0079). The term “Operating Expense” was amended by the Bankruptcy Court for PMES to mean a flat fee of 30% of the gross revenue from the sale of Recovered Materials. Pursuant to Orders approving the Agreement, operating expenses for Seller (Trustee) are also deducted to arrive at Processing Revenue, as described more fully below. Processing Revenue is then is distributed as follows:

- (1) 5% to be held in escrow to cover “remediation issues” in an Environmental Remediation Fund;
- (2) 25% to PMES;
- (3) 35% to Trustee;
- (4) 35% to Commerce Bank.

(APP 0059, par. 4.4(a)). As noted by PMES in its Brief, the Environmental Remediation Fund can be used to address environmental issues at the site and should therefore be considered to provide a positive benefit to the IEPA and its constituency. (PMES Brief, p. 8).

The calculations showing the determination of Processing Revenue and Allocation of Processing Revenue set forth by PMES are accurate and comply with the terms of the orders, Agreement and notices. (PMES Brief, p. 10).

ARGUMENT

A. Standard of Review

The Trustee agrees with and adopts Section A of the PMES Brief regarding standard of review. (PMES Brief, pp. 12 – 13). Because the Bankruptcy Court considered interpretation of an agreement that it had previously reviewed and approved, the Order in this Court is given deference and should only be overturned if the record shows an abuse of discretion. See, ReGen Capital I, Inc. v. UAL Corp., 635 F.3d 312, 319 (7th Cir. 2011).

B. Waiver

Arguments not raised in the lower court are waived on appeal. In Re SLM Trans. Inc., 2010 WL 1882054 at 1; Belom v. Nat'l Futures Association, 284 F3d 795, 799 (7th Cir. 2002). The chart set forth at page 14 of the PMES Brief succinctly shows the shifting nature of the IEPA claims. For the reasons set forth therein, the arguments made before the Bankruptcy Court have been abandoned and those presented in this appeal waived by the failure to make them in the court below.

C. The Order Approving Distribution of Funds is Appropriate

Most of the IEPA appeal is directed to and addressed by PMES and Commerce Bank. (See, IEPA Brief, pp. 1-2). The Trustee supports PMES and Commerce Bank in their respective positions that the payments authorized under the Order appealed from are appropriate. As this Court is aware, significant progress is now being made in demolition and remediation at the site. Demolition at a facility of this size is a large and expensive proposition, made more so by this being the subject of so many environmental concerns. It would be highly regrettable for everyone involved with or affected by the Chemetco Estate if the progress now being made at the site were to be halted by cutting off revenue essential to continued operations of the Trustee and

the Buyer. This is particularly true since the distribution requested by the Trustee complies fully with the notices, orders and the Agreement as amended and clarified.

D. IEPA's Operating Expense Argument is Without Merit

The IEPA raises one last issue regarding distribution for expenses of the Trustee. The IEPA asserts that the Trustee has no right to reimbursement of operating expenses and that there is insufficient documentation of the expenses considered. Contrary to IEPA's view, the Estate of Chemetco (the "Seller") under the Agreement, is authorized to distribute the Processing Revenue, which is further defined as Gross Revenue net of Operating Expenses. The term "Operating Expenses" is defined in the Agreement as:

"Operating Expenses" shall mean operating expenses incurred by **Seller** and Buyer from and after Court approval that are directly related to (i) demolition, removal and sale of Scrap Assets; (ii) the operation and maintenance of the Processing Facility; (iii) the processing of the Scrubber Sludge and Slag, including but not limited to loading, hauling, conveying, crushing, screening, grinding, physical separation, chemical separation, solid-liquid separation, power, consumables (reagents), drying and packaging and all other expenses, including waste disposal costs, as determined under GAAP; (iv) Smelter Site costs, including without limitation, real estate taxes, insurance coverage, maintenance and upkeep; (v) personnel and administrations costs, including trustee's fees and any applicable tax excluding income tax; (vi) the marketing and selling of the Recovered Materials, including but not limited to shipping, insurance, and all other selling expenses as determined under GAAP; (vii) environmental compliance costs; (viii) health and safety costs; and (ix) mutually agreed upon charges by the parties from time to time.

(APP 0079)(emphasis supplied). Thus, Seller (the Estate of Chemetco) is expressly authorized to pay the operating expenses incurred in the broad categories identified above. In addition, prudently, the Trustee must budget and reserve for future operating expenses, thus mitigating the possibility that the Estate would run short of essential operating funds given the episodic nature of revenue producing events.

The Trustee's position is managed and governed by the United States Trustee's Office and is subject to extensive reporting requirements and other regulations. Information about funds administered by the Trustee, including expenses, can be obtained by any party requesting the same.³ Significantly, there is no requirement, nor is it common practice, that the Trustee would provide a detailed expense report to accompany any notice of sale. In fact, doing so would be substantially outside ordinary practice and would likely bring the Estate administration process to a grinding halt.

The Motion to Clarify The Asset Purchase and Processing Agreement filed on 03/09/10 (Doc. 1426) specifically noted and addressed the risk presented by excessive litigation of business operation decisions. The Motion stated:

4. The Purchase Agreement also sets forth numerous instances in which the Trustee and IAD would discuss issues and make decisions related to the Processing Facility. It was and remains the intention of the parties that the Trustee would have authority to make said decisions without coming back to the Court to approve each decision related to the operations of the Processing Facility. The purpose of this Motion also is to clarify that the Trustee has the authority to make said decisions so as to allow the process to operate smoothly and efficiently. In order for this process to succeed, the liquidation of the assets through the Processing Facility needs to proceed in a responsive, business-like atmosphere. **It will be impossible to come back and ask the Court to approve each decision necessary to maintain the day-to-day operations of the bankruptcy estate under the Purchase Agreement and Processing Agreement.**

(APP 0008, par. 4)(emphasis supplied). The Motion further requested that the Trustee be authorized to "make all decisions necessary to facilitate the operations of the Processing Facility as they relate to the Purchase Agreement and the Processing Agreement." (APP0008). The Bankruptcy Court entered its Order Granting this Motion on May 4, 2010. (APP0010).

³ The de minimus nature of this point in the appeal is shown by the fact that the IEPA has never before made any request for information regarding Trustee expenses; if this were a significant issue, it might have been expected to do so. Further, the IEPA is not precluded from requesting expense information in the future by the decision of the Bankruptcy Court or a decision of this Court affirming the distribution.

The steps taken to sell materials and obtain funds needed to design, approve, construct, and operate the facility have been prudent and necessary. Without operating revenue, there would be no possibility that materials at the site could be processed, a beneficial goal and one shared by all parties.

Finally, should the IEPA (or any other party for that matter) like to review Estate expenses, the information would be made available to it upon request. There is no real dispute that the Estate has incurred significant expenses in administering this property. The parties to this appeal have intimate knowledge of the significant activity levels at the Chemetco site. The IEPA knows or should know that the Estate is incurring substantial expense in paying employees, and for all other activities all of which benefits the Estate.

CONCLUSION

For the foregoing reasons, and for those reasons stated in the Briefs submitted by PMES and Commerce Bank, and for the reasons stated in the record below, the Trustee respectfully requests that the Court affirm the Bankruptcy Court's August 8, 2011 Order and for such other and additional relief as may be just and proper under the circumstances.

MATHIS, MARIFIAN & RICHTER, LTD.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 31st day of October, 2011, the foregoing was served electronically via the Court's ECF/CM System upon James L. Morgan, Assistant Attorney General, Environmental Bureau, 500 South Second Street, Springfield, Illinois 62706 and all other persons requesting electronic notice in this proceeding.

/s/ William J. Niehoff
William J. Niehoff